UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

J. MICHAEL KOEHLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CV 405-367-JFN**
	)	
MARTIN M. GREEN, JULES BRODY, MARTIN D. CHITWOOD, DONALD H. CLOONEY, JOE D. JACOBSON, JONATHAN F. ANDRES, VINCENT R. CAPPUCCI, ANDREW J. ENTWISTLE, GREEN SCHAAF & JACOBSON, P.C., STULL STULL AND BRODY, LLP, CHITWOOD AND HARLEY, LLP, CLOONEY AND ANDERSON, PC	)	
	)	
Defendants.	)	

ORDER

Plaintiff filed the current lawsuit alleging that Defendant attorneys violated the Private Securities Litigation Reform Act and breached their fiduciary duty to Plaintiff during the underlying BankAmerica class action litigation. Before the Court is Defendants' Motion to Dismiss. (Doc. 56.) In their Motion to Dismiss, Defendants argue, among other reasons, that Plaintiff's case should be dismissed as barred by collateral estoppel. For the following reasons, the Court **GRANTS** Defendants' Motion to Dismiss.

I. BACKGROUND

Following the merger of NationsBank Corporation and BankAmerica Corporation in September of 1998, numerous class action lawsuits were filed by shareholders of NationsBank and BankAmerica. The Judicial Panel on Multidistrict Litigation transferred the actions in federal court to the Eastern District of Missouri for consolidated pretrial proceedings, and the cases were assigned to Judge John Nangle.

Pursuant to the Private Securities Litigation Reform Act [hereinafter "PSLRA"], the Court appointed seven lead plaintiffs to represent the NationsBank classes. The Plaintiff in the present case, J. Michael Koehler, was appointed as one of these lead plaintiffs, along with Kevin Kloster, Earl J. Gates, Robert Hepworth, Pamela Wootten, Joseph Hempen and David P. Oetting. The Court also appointed lead counsel to represent the lead plaintiffs and class members: the Court appointed Defendant law firm Green Schaaf & Jacobson as lead counsel for the NationsBank Classes and Defendant law firms Chitwood & Harley and Stull, Stull & Brody as co-lead counsel. The law firm of Entwistle & Cappucci, LLP was made an executive committee member.[1] All Defendants herein were lead counsel for the NationsBank classes (collectively "Lead Counsel").

In late January of 2002, three years after the inception of this litigation, the

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[1] Defendants Jonathan F. Andres, Joe D. Jacobson, and Martin M. Green are attorneys at Green Schaaf & Jacobson, Defendant Jules Brody is an attorney at Stull, Stull & Brody, Defendant Martin D. Chitwood is an attorney at Chitwood & Harley and Defendants Andrew J. Entwistle and Vincent R. Cappucci are attorneys at Entwistle & Cappucci.

parties in the BankAmerica litigation pursued mediation in New York City on their own initiative.[2] This mediation was led by retired federal Judge Nicholas Politan, and it was attended by some of the Defendants in the instant matter, and by Plaintiff Koehler, herein, and lead plaintiffs Kloster and Oetting for the NationsBank class.

Koehler alleges that it was during this mediation that violations of the PSLRA and misrepresentations by counsel began to occur. In his complaint, Koehler alleges that Lead Counsel and Oetting, Kloster and Koehler ("the Koehler Group") unanimously agreed that unless Bank of America offered a settlement to the NationsBank Classes in the range of $600 to $750 million, payable in stock, the negotiations would be terminated and the action would proceed to trial. (Doc. 1 at 8-9.) According to Koehler, on the second day of negotiations, Lead Counsel agreed with the Koehler Group that negotiations were futile and that the case would proceed to trial. Koehler maintains that Kloster and Oetting left the mediation site in the belief that negotiations would end (Doc. 1 at 9). He also maintains that he left later, at which time Lead Counsel reaffirmed that no settlement would be reached unless it was in the range of $600 to $750 million, payable in stock. Koehler maintains that he left the mediation site in reliance of this representation.

Koehler alleges that mediation continued for a third day without his knowledge, at which time Lead Counsel executed a Memorandum of Understanding

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[2] Jules Brody gave his account of the mediation before the Court on March 15, 2002. See Transcript of Motion Hearing March 15, 2002, In re BankAmerica, at 7-11 [hereinafter March 15 Hearing].

("MOU"), which settled all claims asserted in the BankAmerica litigation. (Doc. 1 at 10.) The MOU provided for global settlement of cash payment totaling $490 million: $333.2 million to the Nations Bank Classes and $156.8 million to the BankAmerica Classes. Id.

After notification of the MOU, the Court ordered the case removed from the trial docket.

II. DISCUSSION

A. MISREPRESENTATIONS

Plaintiff Koehler alleges that numerous misrepresentations were made by Lead Counsel to the Court.[3] Specifically, he contends that Lead Counsel falsely represented to the Court that Koehler, Kloster and Oetting authorized the settlement, consented to its terms and

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[3] The Court would note that Plaintiff's pleadings contain certain statements that are inappropriate for inclusion in a brief. First, Koehler states that "criminal indictments have been issued that implicate one of the class action firms that was involved in the underlying case." (Doc. 71 at 4.) While this statement is technically true, Koehler fails to mention that this Court severely reprimanded that firm (Milberg Weiss) for its tactics in the BankAmerica case and enjoined them from proceeding in a conflicting case in California. Obviously this matter has no relevance to the case at hand, and seems to be aimed at arousing some suspicion which implicates the Defendants herein (who likewise opposed the actions of Milberg and Weiss). Second, Koehler implies that the Eighth Circuit Court of Appeals "invited" the current case by lifting an offhand comment of a judge on the panel during oral argument. In response to argument he felt was irrelevant to the issue on appeal, Judge Smith of the Eighth Circuit stated "sounds like an interesting case that [the appellants] may have against counsel.'" Id. at 1 (quoting Transcript of oral argument, June 13, 2003). Koehler then fails to mention that his own counsel responded, "[Y]our honor, a malpractice case in class action setting would be novel." Transcript of oral argument, June 13, 2003. Third, it is obvious that Plaintiff has indiscriminately sued every attorney named in leading counsel roles for the NationsBank plaintiffs. However, parties have conceded that Defendants Anderson, Cappucci and Entwhistle were not in any way involved in the mediation negotiations.

had no objections to it.[4]

On February 20, 2002, the Court held the first of two hearings to determine preliminary approval of the settlement. Plaintiff contends that Lead Counsel, at the February 20th hearing, deliberately concealed from the Court that the Koehler Group was excluded from the negotiation and that the MOU violated the Koehler Group's unanimous agreement with Lead Counsel. During the hearing, the record shows that Oetting made known to the Court his objections to the settlement.

> At that time this Court stated:
>
> David Oetting is a member of the class, and just for now, we can say that he has objections to the proposed settlement and apparently was not allowed by Judge Politan to participate in it.
> . . .

Transcript of February 20, 2002 Hearing, In re BankAmerica, at 20-21 [hereinafter February 20 Hearing].

On March 15, 2002, another hearing was held by this Court, at which time Oetting again expressed to the Court his objections to the settlement. Oetting stated:

> [T]here are actually three class plaintiffs who are involved in the mediation; Mr. Kloster, Koehler and myself. And I've spoken

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[4] Koehler's statement is contested by Jules Brody, who was Lead Counsel for Koehler during the mediation of the BankAmerica matter. Brody stated that Koehler "left me with instructions during the day that if I thought the amount was within the norm, it should be accepted, then I had his authority to accept it." Transcript of Motion Hearing March 15, 2002, In re BankAmerica, at 8-9 [hereinafter March 15 Hearing]. Koehler's counsel at the fairness hearing confirmed that Koehler had given Brody his permission to settle the case, but the permission assumed it would be within certain parameters. Transcript of Fairness Hearing, In re BankAmerica, at 107 [hereinafter Fairness Hearing Transcript].

> with each of them recently, and none of the three of us have approved the settlement. And if I were to say it in a positive way, I would say this is being done despite our lack of approval and over our disapproval, however you might say it.

March 15 Hearing, at 5-6. Also at the March 15th hearing lead counsel Brody represented to the Court that Koehler, Oetting and Kloster did not object to the global settlement: "as I best understand it, it's not the amount that the NationsBank people are directly getting, but that there was a big package and the allocation wasn't fair [to the NationsBank class]." Id. at 10-11. But lead plaintiff Oetting corrected Brody, telling the Court that his disapproval of the settlement and surrounding matters had started in January 2002, when the mediation took place. Id. at 13. The Court directly asked Oetting: "As you stand here, are you absolutely against this, maybe in the middle, or you don't know or you're not sure, or you're totally for it?" Id. at 14. Oetting replied:

> [M]y point really of being here this morning is to clear the record that under paragraph 28 [of the stipulation] that we–and I speak for the other two–did not expressly approve this settlement. Because if we later object, somebody might think we're schizophrenic or something.

Id. at 18. The Court replied, "I got the picture the last time you were here that you weren't pleased with it." Id. The Court noted also there would be a chance at the fairness hearing to be properly heard on the issue. Id.

At the May 20, 2002 fairness hearing, lead counsel Martin Green made clear to the Court that Oetting did not authorize the agreement. Green stated:

> Oetting . . . indicated to me this morning . . . that he did not

> expressly authorize this agreement. And he further told me that he believed that one of the other lead plaintiffs also did not expressly authorize it. That may have been my fault. As we were preparing these documents, I was under the impression that Mr. Oetting had given us his blessings on this.

Fairness Hearing Transcript, at 4.

It is apparent from Green's testimony that any misrepresentation to the Court was a mistake. Green took full responsibility for mistakenly stipulating that plaintiffs expressly authorized counsel to enter into the agreement, and further notified the Court of the error before the Court substantively reviewed the proposal. Undoubtedly, the complexity of the litigation and the nature of the settlement negotiations created a situation ripe for misunderstanding. Even assuming that Lead Counsel misrepresented Koehler's views of the settlement, the Court finds that any misrepresentation by Green was not motivated by malice or fraudulent intent. The Court further finds that any such misrepresentation in paragraph 28 of the stipulation was harmless, as Green quickly conveyed to the Court the actual views of Oetting and other objecting plaintiffs before the Court reviewed the alleged "misrepresentation" of Lead Plaintiffs' approval.

After holding two preliminary hearings and a fairness hearing, the Court found that the settlement was fair and reasonable.[5] Of nearly 964,000,000 outstanding shares of NationsBank stock and 687,797,211 outstanding shares of BankAmerica stock, the Court

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[5] Incidentally, the Court commented to defense counsel for BankAmerica that, personally, the Court believed the defense had agreed to pay much more in settlement than the Court expected, considering the complications of proving liability and damages under the PSLRA. (Doc. 53, 19-20.)

solicited and received only ten objections to the settlement. In re BankAmerica Corporation Securities Litigation, 350 F.3d 747, 750 (8th Cir. 2003) (affirming the settlement over Koehler's and Oetting's appeal).[6] More than one-half of the total shares were held by institutional holders, and not one of them objected to the settlement in this case.

The Court was well aware of the conduct of Lead Counsel, objections of Lead Plaintiffs, and alleged misrepresentations to the Court during the original BankAmerica litigation, and the Court specifically found that "Lead Counsel have conducted themselves professionally and have adequately and zealously represented the interests of their clients." Fairness Order, at 43. Therefore for the following reasons, the Court finds that Plaintiff's claims against counsel for misrepresentation are barred by collateral estoppel.

B. PSLRA

Plaintiff Koehler, in his complaint, alleges that Defendants violated specific provisions of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 et seq. ("PSLRA"). He claims that pursuant to the PSLRA, he "had the right to, among other things, (a) control and influence settlement negotiations, and (b) authorize, reject, accept and comment upon any offer of settlement." (Doc. 1, ¶ 141.)

Koehler previously appealed this issue to the Eighth Circuit in the original BankAmerica litigation. On appeal to the Eighth Circuit, Koehler asserted that PSLRA,

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[6] The Court received three objections which argued that BankAmerica should not pay anything since the money being used to pay the class plaintiffs was in effect coming out out of a company in which the class plaintiffs held stock.

> empowers lead plaintiffs to direct, control, and manage class securities litigation and presumes the reasonableness of lead plaintiff's decisions, and (II) [sic] the District Court ignored the requirements of the act by approving the proposed settlement without the lead plaintiff's consideration or agreement and without any showing that the lead plaintiff's disapproval was inimical to the class.

Appeal From the United States District Court Eastern District of Missouri MDL Docket No. 1264, The Honorable John F. Nangle, Senior District Judge, Appellants' Brief, 11 [hereinafter "Appellants' Brief"].

The Eighth Circuit rejected Koehler's argument and affirmed the District Court's decision. The Eighth Circuit noted that while PSLRA is "explicit on the lead plaintiff's authority to select and retain counsel, it is silent on the other responsibilities and rights that lead plaintiffs have to control, direct and manage class action securities litigation. In particular, the Act says nothing about whether the lead plaintiff must either approve a settlement or be replaced for actions inimical to class interests." In re BankAmerica Corp. Securities Litigation, 350 F.3d 747, 751 (8th Cir. 2003). Because the Eighth Circuit found that the Act was silent about lead plaintiffs' authority to control litigation, the Court focused on the narrow issue of "what weight a district court must give to objections from a fraction of a fractured lead plaintiff group." Id. The Eighth Circuit found that although PSLRA encourages lead plaintiffs in class action securities suits to be more involved, it does not "explicitly grant . . . a veto power to lead plaintiffs." Id. at 751-2.

To the extent Plaintiff is arguing that under PSLRA he had the power to single-

handedly control the disposition of the litigation, his argument is blatantly wrong. It is also collaterally estopped.

The Court applies Missouri law when analyzing the doctrine of collateral estoppel. Liberty Mut. Ins. Co. v. FAG Bearings Corp., 335 F.3d 752, 758 (8th Cir. 2003). Under Missouri Law, the Court must ask: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication. Id. "[O]nly those issues actually and necessarily decided in the first suit may have preclusive effect in a subsequent action." Id.

In the current case, Plaintiff Koehler is collaterally estopped from bringing his PSLRA claim because he previously appealed this issue to the Eighth Circuit in the original BankAmerica litigation. The Eighth Circuit opinion stated not only that the Act was silent on a lead plaintiff's rights to control litigation, but also that the District Court did not abuse its discretion in approving the settlement over Koehler's objections. In re BankAmerica Corp. Securities Litigation, 350 F.3d 747, 751 (8th Cir. 2003).

Alternatively, if Plaintiff is arguing that he was denied the right under PSLRA to comment on the litigation, his argument fails because Plaintiff did in fact comment on the settlement. Not only did Koehler submit a brief in opposition to the settlement before the fairness hearing, but also he was represented by his own counsel, Mitchell Margo, at the

fairness hearing, who presented Koehler's opposition to the settlement. Fairness Hearing Transcript, supra, at 106. As noted above, Plaintiff and lead plaintiff Oetting also made their objections known on appeal to the Eighth Circuit.

In fact, lead plaintiffs were extremely involved in the underlying BankAmerica case, and Lead Counsel were aware of the PSLRA's impact on the securities practice and the role of lead plaintiffs.[7] Koehler even admitted that "[t]hroughout the litigation the lead plaintiffs participated with class counsel in discovery and the development of legal theories and strategy. Counsel kept lead plaintiffs informed of the status of the case and other developments . . . [and] all three NationsBank lead plaintiffs participated in the mediation with class counsel." Appellants' Brief, supra, at 13. Because lead plaintiffs were greatly involved in the underlying BankAmerica case, the requirements of PSLRA were satisfied. Moreover, the Court was aware of all of the objections of lead plaintiffs well before it approved the settlement herein. However, a lead plaintiff such as Koehler may not exclusively "control" class action litigation. As the Eighth Circuit previously decided, a fraction of a fractured lead plaintiff group may not singlehandedly veto a class action settlement to the detriment of the class as a whole. In re BankAmerica, 350 F.3d at 751-2. PSLRA does not authorize two or three lead plaintiffs to block a class action settlement benefiting thousands of others.

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[7] Lead Counsel Green stated at the March 15, 2002 hearing "under the PSLRA it's not a hundred percent clear, but one of the functions of the lead plaintiffs is to be involved." March 15 Hearing, supra, at 7.

Accordingly, the Court **FINDS** that Plaintiff's claim against Defendants for violations of the PSLRA is barred by collateral estoppel.

C. BREACH OF FIDUCIARY DUTIES

Plaintiff alleges that Defendants breached their fiduciary duty to him during the underlying BankAmerica class action litigation. Specifically, Plaintiff alleges Lead Counsel had a duty to: (i) keep Koehler informed of all settlement offers and material information regarding any offer of settlement; (ii) seek and gain Koehler's consent to any proposed settlement; and (iii) represent to the Court fully and accurately Koehler's views of any offer of settlement and settlement agreement. (Doc. 1, ¶ 163.) Plaintiff alleges that Defendants breached their duty to Plaintiff by not informing him of the settlement offer before the MOU was signed and then misrepresenting Plaintiff's and other Lead Plaintiffs' positions to the Court. Plaintiff is not challenging the fairness and adequacy of the settlement, but he argues that his claims for breach of fiduciary duty are separate from a challenge to the terms of the settlement.

Defendants argue that Plaintiff's case should be dismissed under the doctrine of collateral estoppel. (Doc. 57 at 10-13.) They contend that the Court's Fairness Hearing and approval of the settlement included a determination that defendants faithfully discharged their duties to the NationsBank classes, and that such determination now bars Plaintiff's claims of breach of fiduciary duties. Id.

A review of the law shows that Koehler's claim for breach of fiduciary duty is collaterally estopped. The Sixth, D.C., and Ninth Circuits have all held that malpractice actions are collaterally estopped after a final settlement has been approved. Similar to these cases, the current case is a malpractice/breach of fiduciary duty action against Plaintiff's former attorneys during class action litigation. The Court will briefly review these decisions.

In Laskey v. Int'l Union, 638 F.2d 954 (6th Cir. 1981), the court held that appellants were estopped from challenging the adequacy of the legal representation in a separate suit after the class action settlement had been approved. Similar to the BankAmerica case, it was erroneously stated in Laskey that the named plaintiffs agreed to the settlement terms. This error was pointed out to the court, so the error was considered harmless. Id. at 955. At the fairness hearing, the district court heard the complaints of the named plaintiffs and others and was fully aware of the objections to the settlement when the court approved the settlement. Because the appellants had an opportunity to object to the legal representation at the settlement hearing and there was a finding that the settlement was fair and reasonable, the appellants were estopped from later challenging the adequacy of the legal representation. Id. at 957.

In Thomas v. Albright, 77 F. Supp. 2d 114 (D.D.C. 1999), affirmed by Thomas v. Powell, 247 F.3d 260 (D.C. Cir. 2001), the District Court of the District of Columbia held that a state court malpractice action against the lawyers in a class action was collaterally estopped because plaintiffs' objections to settlement and adequacy of class counsel were

fully addressed at the fairness hearing. The court said, "what is clear is that the settlement and consent decree rest on the essential finding that class counsel adequately represented the plaintiffs." Id. at 121. The Thomas court explained:

> The Court is concerned that allowing the malpractice action to proceed necessarily implies a nullification of this Court's findings on the adequacy of counsel's representation of the plaintiffs. It removes one of the Court's most important functions in a class action–protecting the interests of the class members through fairness hearings and other procedures designed to assure that members of the class as a whole are not compromised by the individual interests of a minority of the class, or possibly by the vindictiveness of a few. The Court expects that its findings on the fairness of a settlement, adequacy of notices, and adequacy of class representation are final and have the force of law. The dissident plaintiffs' attempt to relitigate this Court's findings through the ruse of a so-called malpractice action would have the effect of undermining the settlement and consent decree reached in this matter.

Id. at 123. The District Court in BankAmerica, like the court in Thomas, found not only that the settlement was fair and adequate, but also that counsel adequately represented the class. Fairness Hearing Order, at 26 (finding that "lead counsel's overriding duty [was] to the plaintiff class [, and] . . . NationsBank class counsel succeeded their duty and met their objective in agreeing to the proposed settlement agreement").

In Golden v. Pacific Maritime Association, 786 F.2d 1425 (9th Cir. 1986), the Ninth Circuit affirmed the district court's injunction of a suit alleging malpractice and fraud against the plaintiff's former attorneys in a class action settlement. The district court found that the plaintiff had a full and fair opportunity to litigate those issues in the fairness

hearings, and the Ninth Circuit noted that the attorney's conduct had been challenged on several occasions during the fairness hearings. Id. at 1428-9.

The foregoing cases have ruled that a lead plaintiff in a class action settlement may not later bring suit against his attorneys when the plaintiff has had an opportunity to object to the class action settlement and the court has considered the adequacy of counsel. Plaintiff argues that the alleged evidence of the lawyers' misconduct was never presented to the Court. However, as the record herein shows, the District Court spent extensive time considering the lead plaintiffs' alleged exclusion from the mediation and their objections to the overall settlement.

Because the Eighth Circuit Court of Appeals affirmed the settlement and Plaintiff Koehler has admitted that he is not challenging the adequacy of the settlement, it should be unnecessary to address whether the settlement was fair, reasonable, and adequate to the class through Koehler's breach of fiduciary duty claim. However, the Court feels obliged to comment on the fairness of the settlement to show how baseless Plaintiff's case clearly is. The hurdles faced by these plaintiffs in the BankAmerica case were tremendous, including overcoming significant motions for summary judgment and motions in limine (including Daubert questions), proving causation, and probably most important, proving damages (including the application of PSLRA's bounce-back provision). This Court has participated in hundreds of class actions as Chairman of the Judicial Panel on Multidistrict Litigation. The BankAmerica case was one of the most complex and difficult class-action

securities cases in this Court's memory. Whatever happened at the mediation with Judge Politan had no effect on what actions this Court took. The obvious fairness of this settlement was approved by this Court after it held two preliminary hearings and a fairness hearing, at which all persons had full opportunity to comment.

Before approving the settlement, the Court was well aware of Koehler's disapproval of the settlement. Lead plaintiff Oetting, at the March 15th Hearing, emphasized that Koehler joined him in his thoughts on the settlement. In May 2002, Koehler, together with Oetting, filed a detailed list of objections to the settlement. Finally, at the Fairness Hearing in May, Koehler's views on the settlement were again presented to the Court through his selected counsel.[8] On appeal, the Eighth Circuit affirmed the fairness of the settlement, noting the familiarity of the District Court with the class action suit. BankAmerica, 350 F.3d at 752.

The Court also heard specific allegations of misrepresentation by Lead Counsel in the original BankAmerica suit. For example, in the original BankAmerica proceedings, Koehler protested to the Court that the lawyers were engaging in an attempt to cover up his disapproval of the settlement. In his objections to the settlement, Plaintiff wrote: "[s]ince the proposed settlement was penned, there have been a variety of efforts to persuade the Court that the Class Representative or others actually approved the proposed settlement or

[8]Mr. Mitchell Margo spoke to the Court at the fairness hearing on behalf of Koehler, and expressed to the Court Koehler's dissatisfaction with the settlement and Koehler's opinion that lead counsel committed ethical violations. Fairness Hearing, at 106-111.

subsequently supported it." Memorandum to "Objections to Proposed Class Action Settlement," May 13, 2002, at 6. Counsel Mitchell Margo then spoke to the Court at the fairness hearing on behalf of Koehler, and he went so far as to accuse Lead Counsel of ethical violations. Fairness Hearing, supra, 106-111. Despite Koehler's objections, this Court specifically found that "lead counsel's overriding duty [was] to the plaintiff class . . . and [i]n securing such a large settlement for the NationsBank plaintiffs in the face of great risks in proceeding to trial, [the] NationsBank class counsel succeeded [in] their duty and met their objective in agreeing to the proposed settlement agreement." Fairness Order, at 26.

The Court also specifically considered a motion to remove Lead Counsel. In denying the motion, the Court stated "this Court has lived with this case for many years and, in doing so, has had many occasions on which [to] judge the representation by lead counsel of their client classes. Lead counsel have conducted themselves professionally and have adequately and zealously represented the interests of their clients." Fairness Order, at 43. Therefore, evidence in the original BankAmerica litigation shows that Plaintiff Koehler had already explored every objection to the settlement and the actions of Lead Counsel. As noted before, this Court considered all of this before finding that Lead Counsel "succeeded [in] their duty." Fairness Order, at 26.

Because Plaintiff had an opportunity to object to the class action settlement and the court considered the adequacy of counsel during the original BankAmerica litigation, this Court will follow the precedent of the Sixth, Ninth, and D.C. Circuits. Accordingly, the

Court **FINDS** that Plaintiff's claims are barred by collateral estoppel.

Plaintiff states that the Ninth Circuit, district courts in Louisiana and North Carolina, and the Missouri Court of Appeals have held that approval of a settlement after a fairness hearing does not preclude a later malpractice suit. However, these cases are factually distinguishable. The Court will briefly review these decisions.

In Durkin v. Shea & Gould, 92 F.3d 1510 (9th Cir. 1996), the Ninth Circuit found that a court-approved settlement of a shareholder derivative suit did not preclude a subsequent malpractice action. The Durkin case is distinguishable from the present case because in Durkin, the fact of the Defendant's impending bankruptcy was not disclosed to the magistrate judge. Id. at 1513. Specifically, the Ninth Circuit noted that special circumstances existed which warranted an exception to the normal rules of preclusion. Id. at 1515. The subsequent malpractice action was allowed to continue when "the quality, extensiveness, or fairness of procedure in prior litigation" was in question. Id. In the present case, however, there is no question that the settlement was exceedingly fair, and no special circumstances exist to warrant an exception to the normal rules of preclusion.

Plaintiff has also cited two additional decisions, Byes v. Telecheck Recovery Servs., Inc., 173 F.R.D. 412, 428-429 (E.D. La. 1997), and Deadwyler v. Volkswagen of America, Inc., 134 F.R.D. 128, 140 (W.D.N.C.1991), aff'd, 966 F.2d 1443 (4th Cir. 1992). Both of these cases allowed malpractice suits to continue against former class action attorneys; however, they are distinguishable from the present case because they suggest that

class plaintiffs had acted as little more than unwitting pawns to class counsel. Byes, 173 F.R.D. at 427-8. Koehler and other lead representatives were hardly unwitting pawns. According to Plaintiff himself, he "participated substantially in the conduct of the litigation" up to the mediation.[9] Appellants' Brief, at 3.

Finally, Plaintiff cites Missouri Court of Appeals cases Baldrige v. Lacks, 883 S.W.2d 947 (Mo.App. E.D. 1994)[10] and Ryan v. Ford, 16 S.W.3d 644, (Mo.App. W.D. 2000) to suggest that approval of an individual's settlement does not preclude a subsequent suit for malpractice. However, these cases are also distinguishable. In Lacks, the court found that adequacy of the attorney was never addressed in the settlement for divorce and alimony. Lacks, 883 S.W.2d at 950-2. In Ryan, the attorney admitted that issues of breach of fiduciary duty and malpractice were not tried in the underlying suit. Ryan, 16 S.W.3d at 648. In the present case, however, the Court was fully informed of Koehler's objections to the settlement and the conduct of Lead Counsel, and still found that Lead Counsel had "adequately and zealously represented the interests of their clients." Fairness Order, at 43.

The cases of Lacks and Ryan are also distinguishable because there, the courts applied a different standard of duty owed to plaintiffs in individual settlements versus class

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[9]Specifically, Koehler asserts that "throughout the litigation the lead plaintiffs participated with class counsel in discovery and the development of legal theories and strategy. Counsel kept lead plaintiffs informed of the status of the case and other developments. . . . All three NationsBank lead plaintiffs participated in the mediation with class counsel." Appellants' Brief, at 13.

[10] The Court notes this case was also recently superceded by rule and overturned by Pope v. Pope, 179 S.W.3d 442 (Mo.App. W.D. Dec 20, 2005).

action settlements. In class action suits, class counsel's obligations are to "represent the interests of the class, as opposed to the potentially conflicting interests of the individual class members." Fed. R. Civ. P. 23(g)(1)(B) (Advisory Committee Notes for the 2003 Amendments). This obligation may be different from the customary obligations of counsel to individual clients because "class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole." Id.

Therefore, authority suggests that lead counsel in class action litigation have a duty to keep representatives involved in litigation. However, this duty to keep representatives involved should not supersede their duty to the class as a whole to obtain a fair and adequate settlement. This duty owed by Defendants to Koehler was challenged in the original BankAmerica proceeding. However, the District Court found that "Lead Counsel have conducted themselves professionally and have adequately and zealously represented the interests of their clients." Fairness Order, at 43. This Court was convinced at the time and is still convinced that, considering the complexity of the original BankAmerica suit, this case was well handled by outstanding and diligent lawyers on all sides who fulfilled their duty to their clients as a whole and negotiated an exceedingly fair settlement. Having been previously decided, this issue cannot later be relitigated, and Plaintiff Koehler's claim of breach of fiduciary duty is barred by collateral estoppel.

III. CONCLUSION

The Court finds that issues relating to violations of PSLRA, the adequacy of representation by Lead Counsel and the fairness of the settlement were presented in the original BankAmerica action. The Court then found that class counsel had satisfied their duty to the class and the settlement was fair. Therefore, Plaintiff's claims against Defendants for violations of PSLRA and breach of fiduciary duty are barred by collateral estoppel.

Accordingly, **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (Doc. 56) is **GRANTED**. Because Plaintiff is estopped from claiming breach of fiduciary duty, his claims of Aiding and Abetting breach of fiduciary duty and Conspiracy to breach fiduciary duty must also fail.

IT IS FURTHER ORDERED that the full record of the original BankAmerica litigation, MDL 1264, shall be incorporated and made a part of the record in the current case.

IT IS FURTHER ORDERED that this order dispenses with Defendant Cappucci's and Defendant Entwistle's motion for summary judgment and Plaintiff Kochler's motion to file in excess of page limit, and the Court **INSTRUCTS** the Clerk to deny these pending motions as moot.

So ORDERED.

JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: April 20, 2006